UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER, Plaintiff, v. NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Case No. 2:03-cv-665 Judge Holschuh Magistrate Judge Abel

REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES, LLC, AND JOHN LOMBARDO, M.D.

1. There is no justification for deferring resolution of this motion. Instead, there are compelling, common sense reasons to resolve the dispositive legal issue presented by the NFL Defendants' motion before invoking the expensive, burdensome machinery of the class certification process. Notwithstanding plaintiff's suggestion to the contrary, "[i]t has never been doubted that a complaint asserting a class action could be dismissed on the merits before determining whether the suit could be maintained as a class action." Marx v. Centran Corp., 747 F.2d 1536, 1552 (6th Cir. 1984). Accord, e.g., Thompson v. County of Medina, 29 F.3d 238, 241 (6th Cir. 1994); Thomas v. Moore USA, Inc., 194 F.R.D. 595, 602 (S.D. Ohio 1999).

2. Plaintiff's statement of "Relevant Facts" cannot obscure the fact that this is a dispute over terms and conditions of employment in a unionized industry. It bears mention that virtually none of the facts asserted in plaintiff's lengthy statement are alleged in the complaint; virtually none are supported by admissible evidence; and none are relevant to the dispositive legal issues presented here. The last point is conclusively demonstrated by the

fact that plaintiff's ten pages of "relevant" facts contain not a single reference to any defendant.

3. Plaintiff does not dispute that proof of her claim would require interpretation of the CBA. Plaintiff's opposition simply ignores the allegations of her complaint, many of which undeniably (as demonstrated in our initial brief at 6, 8-14) require interpretation of the CBA. (The CBA is attached to the Declaration of Dennis Curran, dated October 24, 2003, submitted with our initial Motion).

Plaintiff ignores, for example, her allegation that the Joint Safety Committee failed to take adequate steps to prevent heat-related injuries (Compl. ¶ 8), an allegation that would, of necessity, require interpretation of the Committee's duties as spelled out in the CBA. See CBA Art. XIII.[1] As another example, plaintiff seeks to distance herself from the complaint's allegations challenging the training and practices of NFL club physicians and trainers (Compl. ¶¶ 12, 18-21; see Opp. at 21 n.8), all of which are addressed in, and in many respects prescribed by, the CBA. See CBA Art. XLIV & App. I.

It is obvious why plaintiff has ignored these allegations of her complaint: "Only if the plaintiff can prove all the elements of her claim without requiring the court to examine the CBA does her claim escape preemption." Beckwith v. Diesel Tech. Co., No. 99-1548, unreported, 2000 WL 761808, at *3 (6th Cir. May 30, 2000) (citing DeCoe v. Gen. Motors Corp., 32 F.3d 212, 216 (6th Cir. 1994)). She plainly cannot do so here.[2]

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[1] The complaint's only allegations against Dr. Lombardo, an NFL consultant, arise from his (asserted) role "as a leading member" of the Committee. Compl. ¶ 8.

[2] Given the governing preemption standard – "[o]nly if the plaintiff can prove all the elements of her claim without requiring the court to examine the CBA" – it is of no moment that plaintiff refers in her opposition (at 24), but not in her complaint, to the NFL's Game Operations Manual. As its name suggests, that manual governs conduct of NFL games, for which the League determines the schedule, time, and location; it does not purport to regulate conduct of training camps, which are overseen by the individual clubs, subject of course, to their obligations under the CBA. In short, plaintiff's contrived argument based on the Game

4. Plaintiff's status as next-of-kin does not "trump" the LMRA. Plaintiff's argument, for which she offers no legal support, is conclusively undermined by, among other cases, Hechler, Rawson, and Michigan Mutual Insurance Co. (NFL Mem. at 8 n.8, 10-12), all wrongful death actions held preempted by section 301 of the LMRA.[3]

Moreover, contrary to plaintiff's suggestion (Opp. at 18-20), courts routinely hold that contractual arbitration obligations are binding in the context of wrongful death claims. E.g., Arbour v. Jenkins, 4 F.3d 993 (Table), 1993 WL 342872, at *3 (6th Cir. Sept. 8, 1993) (arbitration provisions of Civil Service Reform Act apply to wrongful death claim brought by executrix); Parsley v. Terminix Int'l Co., No. C-3-97-394, unreported, 1998 WL 1572764, at *7 (S.D. Ohio Sept. 15, 1998) (wrongful death and survival action subject to arbitration clause in services contract). Those holdings apply with compelling force here,

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Operations Manual disregards not only (1) the governing provisions of the CBA, which reflects "the complete understanding of the parties on all subjects covered [t]herein," Art. III, Sec. 1, including with regard to the conduct of training camps, id. Arts. XXXVI-XXXVII; but also (2) the established tort law principle that limits the scope of any duty arising from a voluntary undertaking to the scope of the undertaking itself. See, e.g., McGowan v. Cooper Indus., Inc., 863 F.2d 1266, 1278 (6th Cir. 1988). Finally, the cases cited by plaintiff (Opp. at 24 n.9) on this point are readily distinguishable; none involved terms and conditions of employment in a unionized industry.

Nor is there merit to plaintiff's argument that preemption cannot be invoked here because the CBA does not specifically mention heat-related medical problems. That is not a serious argument. The CBA does not mention broken bones or concussions or spine injuries, but there is no dispute that claims arising from medical problems of those kinds would be preempted. See, e.g., Smith v. Houston Oilers, Inc., 87 F.3d 717, 720-21 (5th Cir. 1996) (preempted complaint addressed treatments for broken thumb and torn leg muscle); Sherwin v. Indianapolis Colts, Inc., 752 F. Supp. 1172, 1178 (N.D.N.Y. 1990) (preempted complaint addressed treatment for neck and spine injury). The point here is that the CBA contains a comprehensive procedure for resolution of claims arising from the conditions of players' employment. That the CBA does not mention the word "heat" is of absolutely no significance.

[3] Those cases cannot be distinguished, as plaintiff argues (Opp. at 25-26), on the basis that the next-of-kin there sued the union rather than the employer. There is no support for such a distinction in the case law, the statutory language, the legislative history, or the underlying public policy that the statute seeks to promote. The reasoning and holdings of Rawson, Hechler, and Michigan Mutual Insurance are directly applicable here.

given that the CBA expressly binds the players' heirs. See CBA Arts. LV, XIV & App. C (Player Contract).[4]

5. Plaintiff cannot avoid LMRA preemption by hiding behind the NFL Management Council. Citing the fact that the CBA was formally signed by an NFL affiliate, the NFL Management Council, plaintiff contends that the LMRA cannot be invoked defensively by the NFL Defendants. That argument has no merit. As a threshold matter, plaintiff's contention ignores the established legal principle that "section 301 can preempt claims against non-signatories to a collective bargaining agreement." Dashields v. Robertson, 215 F.3d 1318 (Table), 2000 WL 564024, at *2 n.3 (4th Cir. May 10, 2000); see id. ("[T]he critical question for such preemption remains whether resolution of the claim requires interpretation of or reference to a collective bargaining agreement."). Accord, e.g., Milne Employees Ass'n v. Sun Carriers, Inc., 960 F.2d 1401, 1407 (9th Cir. 1991, amended 1992); Golden v. Kelsey-Hayes Co., 878 F. Supp. 1054, 1056-57 (E.D. Mich. 1995) (claim against non-signatories to CBA preempted by section 301).

This principle applies with compelling force here for two reasons: (1) because of the close relationship between the NFL Defendants and the NFL Management Council; and (2) independently, because the CBA imposes obligations on the NFL Defendants as well as on the NFL Management Council.

The NFL Management Council is an unincorporated association organized under New York law; as such, it "has no existence separate and apart from its members." Barrett

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[4] Plaintiff's assertion that the term "heirs" relates not to the players, but rather to the players' union (Opp. at 20), ignores the plain meaning of the term. Black's Law Dictionary 724 (6th ed. 1990) ("A person who succeeds, by the rules of law, to an estate . . . upon the death of his ancestor, by descent and right of relationship. . . ." [S]he who actively or passively succeeds to the entire property or estate, rights and obligations, of a decedent, and occupies his place." (emphasis added)).

v. N.Y. Republican State Comm., 625 N.Y.S.2d 769, 769, ____ N.E. 2d ____ (App. Div. 1995) (quoting 6 N.Y. Jur. 2d, Associations and Clubs § 7, at 331). The same is true of the NFL itself, which is also an unincorporated association; it has no existence separate and apart from its members. The sole members of both associations are the NFL clubs, who are the sole shareholders of NFL Properties. Because of these close – indeed congruent – relationships, the NFL Defendants plainly are entitled to invoke section 301. See, e.g., United Food & Commercial Workers Local 951 v. Mulder, 31 F.3d 365, 369 (6th Cir. 1994) (indicating that parties with a "close relationship" to CBA signatories can invoke section 301); Williams v. AMF, Inc., 512 F. Supp. 1048, 1055 (S.D. Ohio 1981) ("It is settled in this Circuit that a section 301 suit may be properly maintained by persons other than the parties to the labor agreement . . . ."); cf. Nelson Elec. v. NLRB, 638 F.2d 965, 967 (6th Cir. 1981) (holding that NLRB has jurisdiction over employer represented by a multi-employer bargaining unit).

Second, as numerous CBA provisions confirm, the NFL and its affiliates, whose rights and activities were the subject of collective bargaining, are expressly bound by the CBA. E.g., CBA Art. III, sec. 1 (requiring NFL to bargain in good faith with the NFLPA over material changes in the NFL Constitution and Bylaws that affect terms and conditions of player employment); id. Art. V, sec. 4 (reflecting commitment by the NFL and "any affiliate of the NFL" not to acquire Group Player Licensing rights, a bar that principally affects NFL Properties); id. Art. V, sec. 8 (committing NFL to use best efforts to secure orientation time for NFLPA representatives); id. Art. VI, sec. 2 (requiring NFL to impose a fine on any club that violates certain commitments); id. Art. XIII ((1) requiring the NFL to notify NFLPA of any proposed rule changes; (2) allowing arbitration of NFL rule changes that may "adversely affect player safety"; (3) requiring the NFL to give "serious and

thorough consideration" to any "subject related to player safety and welfare" raised by the Joint Committee; and (4) permitting the Joint Committee to employ "consultants to assist it in the performance of its functions"); id. Art. XXVII (imposing duty on NFL to share arbitration costs and granting NFL rights to appear in any arbitration); id. Art. XXIV, sec. 1(a)(iii) (providing that players shall share in the revenues of NFL Properties through the Salary Cap).

The CBA provisions cited above conclusively undermine plaintiff's reliance on Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 v. Commercial Property Services, Inc., 755 F.2d 499 (6th Cir. 1985). There the Court of Appeals made clear that section 301 would apply if the collective bargaining agreement delineated "rights or duties" of the non-signatory; there can be no dispute that the CBA does so here. Id. at 506. Beyond that, as demonstrated in our opening memorandum, courts routinely invoke section 301 preemption in player cases (which plaintiff failed to address) brought against the NFL itself, as well as against NFL clubs and employees. See NFL Mem. at 15 (citing examples).[5]

[5] Plaintiff's legal discussion (Opp. at 15-17) also confuses (a) a non-signatory's standing to bring a section 301 claim alleging a breach of a collective bargaining agreement and (b) a non-signatory's right to invoke section 301 in defending a claim that requires reference to or interpretation of a CBA. See generally Milne, 960 F.2d at 1406-07.

Accordingly, and for the reasons stated in our initial Memorandum, this Court should dismiss at the threshold and with prejudice the claims against the NFL Defendants.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Memorandum in Support of the Motion to Dismiss of Defendants National Football League, NFL Properties, LLC, and John Lombardo, M.D. was served by the Court's CM/ECF system on this 18th day of December, 2003, upon the following:

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